86-24

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

TELFORD S. EGGLESTON, et al.,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Tax Court committed error as a matter of law in granting Respondent-Appellee's Motion to Dismiss for Lack of Jurisdiction.

2. Whether the notification letters, issued by Respondent-Appellee pursuant to Revenue Procedure 83-78, 1983-2 C.B. 595 constitute "notices of deficiency" within the contemplation of 26 U.S.C. Section 6212 and 6213.

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COMMISSIONER OF INTERNAL REVENUE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

This is a case of first impression involving a question of procedural due process affecting the uniform administration of the Internal Revenue laws. Petitioners hereby respectfully pray a Writ of Certiorari issue to review the decisions of the United

States Court of Appeals for the Fourth Circuit, which sustained the decision of the United States Tax Court dismissing Petitioners' Consolidated Petition.

PARTIES

The parties in this case are Petitioners-Appellants:

Telford S. Eggleston, Jr.

James B. Embree

Dwaine E. Getz

REPORT OF OPINION

The Judgment and Opinion of the Fourth Circuit Court of Appeals in this case is reproduced in the Appendix.

JURISDICTION

The decision sought to be reviewed herein was entered by the Fourth Circuit Court of Appeals on April 9, 1986.

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The following statutes are involved in this case:

26 U.S.C. (Internal Revenue Code of 1954, as amended) §6212(a):

(a) IN GENERAL.---If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 41, 42, 43, 44, or 45, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

26 U.S.C. §6213(a):

(a) TIME FOR FILING PETITION AND RESTRICTION ON ASSESSMENT.--Within 90 days or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as

the last day) the taxpayers may file a petition with the Tax Court a redetermination of the deficiency. Except as otherwise provided in section 6851 or section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A, or B, chapter 41, 42, 43, 44, or 45 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90 day or 150, as the case may be, nor if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

STATEMENT OF THE CASE

On November 2, 1984, the Internal Revenue Service issued "Post-Filing Notification Letters" to the Taxpayers-Appellants herein. Said notices advised that with respect to Appellants' investment with Liberty Financial in 1983, the Internal Revenue Service believes "that the purported tax deductions and/or credits are not allowable." These notices purported to disallow deductions taken, or refunds claimed based on the Liberty Financial 1983 Government Securities Trading Strategy.

Pursuant to the determination evidenced by the notices, all that remains for the Internal Revenue Service ("Service" or "IRS") to do is merely calculate the exact amount of the deficiency for each of the taxpayers having received the notices and who claimed the deduction. In addition, the

aforementioned IRS notices indicate appropriate penalties are to be imposed. The Service did not propose to allow the deduction in any respect, or issue a refund based on the deduction in any amount. All that the IRS proposed, is an administrative effort to easily collect the deficiency is to have each of the taxpayers voluntarily amend their, her or its own income tax return.

Appellants filed a Consolidated Petition in the United States Tax Court on January 28, 1985 in response to said notices, alleging therein that the notices constitute notices of deficiency within the contemplation of 26 U.S.C. Sections 6212 and 6213, thus fulfilling the prerequisite for each of the taxpayers receiving said notice to petition the United States Tax Court for judicial review.

Thereafter, on April 4, 1985, Appellee (Respondent-Commissioner of Internal Revenue Service) filed a Motion to Dismiss Appellants' Consolidated Petition for Lack of Jurisdiction. The Appellee failed to properly serve Appellants (taxpayers) or Appellants' counsel with copies of said motion. The Tax Court granted the Government's motion on April 12, 1985 without allowing the taxpayers an opportunity to respond either orally, or in writing, to the Internal Revenue Service's motion to dismiss.

Judge Dawson vacated his order of dismissal on April 16, 1985 and directed that the parties file memoranda of points and authorities on or before May 15, 1985. The matter was also set for hearing in Washington, D.C. on May 22, 1985.

On May 15, 1985, both the Appellants and the Appellees filed their respective

memoranda of points and authorities with the Tax Court. Thereafter, on May 22, 1985, the hearing was held before Judge Dawson.

On June 17, 1985, Judge Dawson filed his opinion holding for the Government and dismissing the case without a judicial review of the underlying merits of the issues presented by the "Post-Filing Notification" notices (hereinafter PFN). The following day, June 18, 1985, Judge Dawson's order dismissing taxpayers' consolidated petition for lack of jurisdiction was entered in the Tax Court's records.

On June 18, 1985, taxpayers filed a motion for reconsideration of the findings of fact or opinion. This motion was denied by the Tax Court on July 29, 1985. Subsequently, on August 29, 1985, Appellants renewed their motion for reconsideration based upon the receipt of a notice by one of

the 111 co-petitioners that said taxpayer's refund for his 1984 income tax year was being withheld solely due to the prior issuance of the "pre-filing notification letter." The Tax Court denied Appellants' renewal of their motion for reconsideration on September 11, 1985.

ARGUMENT

THE TAX COURT COMMITTED ERROR AS A MATTER OF LAW BY GRANTING THE GOVERNMENT'S MOTION TO DISMISS TAXPAYERS' CONSOLIDATED PETITION FOR LACK OF JURISDICTION

The court's Order of Dismissal prior to its vacation contained the following citations: DaBoul v. Commissioner, 429 F.2d 38 (9th Cir. 1979); Jones v. Commissioner, 62 T.C. 1 (1974); Rule 13, Tax Court Rules of Practice and Procedure. Rule 13 restates the basic principle that issuance of a notice of deficiency is the condition precedent to Tax Court jurisdiction. Both DaBoul and Jones are distinguishable from the facts and

circumstances herein. In those cases no notice was issued. Further, the situation in Jones was subsequently overruled by the United States Supreme Court in Laing v. United States, 423 U.S. 161 (1976). Thereafter, the Tax Reform Act of 1976 added a provision now known as 26 U.S.C. Section 7429, granting a taxpayer falling within that provision administrative and judicial review. Here notices were issued. such notices set forth the taxable year and item questioned by the IRS. the exact amount of the deficiency for the taxpayers is a mere arithmetic mechanical function, no different than the mechanics attributable to determining certain additions to the tax now being asserted by the Internal Revenue Service in certain notices of deficiency (see 26 U.S.C. Section 6653(a)(2), 6653(b)(2), 6659(b), and 6621(d). Thus, the notices at bar, while not in the

standard form for notices of deficiency, are nevertheless in substance notices of deficiency granting the Tax Court jurisdiction with respect to the determination contained in such notices. The reasons follow.

It is unquestioned that the Tax Court's jurisdiction to determine a tax liability prior to payment is predicated upon the existence of a "deficiency" within the meaning of 26 U.S.C. Section 6211(a). Further, it is necessary that the IRS issue a notice of deficiency within the contemplation of 26 U.S.C. Section 6212(a). Consequently, notices of deficiency have been characterized as "tickets to the tax court." Corbett v. Frank, 293 F.2d 501, 502 (C.A. 9, 1961); Laing v. United States, supra at 206.

In the 1983 Tax Court case of Howard S. Scar, et al., 81 T.C. 855 (1983), the court

addressed the issue of whether a writing issued to the taxpayers stating that a deficiency had been determined for their 1978 taxable year in a specified amount constituted a statutory notice of deficiency pursuant to 26 U.S.C. 6212(a).

The Court expounded on the requisites of a notice of deficiency at (860-861) as follows:

* * *

> We start from the established principle that no particular form is required for a statutory notice of deficiency. Commissioner v. Forest Glen Creamery Co., 98 F.2d 968, 971 (7th Cir. 1938); Jarvis v. Commissioner, 78 T.C. 646, 655-656 (1982). As Judge Learned Hand stated in Olsen v. Helvering, 88 F.2d 650, 651 (2d Cir. 1937), "the notice is only to advise the person who is to pay the deficiency that the Commissioner means to assess him; anything that does this unequivocally is good enough." See also Commissioner v. Stewart, 186 F.2d 239, 241 (6th Cir. 1951), revg. a Memorandum Opinion of this Court.

> The requirements of section 6212(a) are met if the notices of deficiency sets forth the amount of the deficiency and the taxable year involved. See Foster v. Commissioner, 80 T.C. 34, 229-230 (1983). It need not contain any particulars or explanations as to how the deficiencies were determined. See Barnes v. Commissioner, 644 F.2d 1385, 1389 (9th Cir. 1981), revg. on other grounds a Memorandum of this Court. (Footnote omitted.) (Emphasis supplied.)

The Tax Court in Scar, supra, went on to articulate its jurisdictional basis at page 861:

* * *

> We are satisfied that the deficiency notices herein meets the aforementioned standards insofar as any question of our jurisdiction is concerned. The fact that is subsequently develops even prior to trial that there was no deficiency on the basis of the grounds set forth in the deficiency notice is irrelevant. See Hannan v.

Commissioner, 52 T.C. 787 (1969). The definition of a "deficiency" contained in section 6211(a) does not require a different conclusion. As we see it, this definition simply outlines the method by which the notices of deficiency should be constructed and do not affect the jurisdiction of this Court. To conclude otherwise would make it mandatory for the Court to go behind the deficiency notice where the petitioner raises the question of whether respondent utilized their tax return in constructing the notice. Such a procedure would fly in the fact of the long-established principle this Court will ordinarily not look behind a deficiency notice. Riland v. Commissioner, 79 T.C. 185, 201 (1982); Greenberg's Express, Inc. v. Commissioner, 62 T.C. 324, 327 (1974). Clearly, no constitutional considerations are involved herein which might justify an exception to this general rule. Riland v. Commissioner, supra; Greenberg's Express, Inc. v. Commissioner, supra at 328. Moreover, we note that, even in situations where the courts have gone behind a deficiency notice, they have not ruled that such notice was null and void, which would be the result herein if we

> accepted petitioners' contentions. See Greenberg's Express, Inc. v. Commissioner, supra at 328. But cf. Llorente v. Commissioner, 649 F.2d 152, 155, n. 4, 157 (2d Cir. 1981), modifying 74 T.C. 260 (1980). Emphasis added.)

* * *

As the Tax Court stated in Scar, supra, it will not look behind a deficiency notice. Here, Appellee is requesting that the court do just that by stating that the Commissioner of Internal Revenue intended the PFNs to be merely advisory. Thus, if the intent in issuing the notices as a notice of deficiency rather than the substantive impact of such notices is the standard, then the Tax Court is therefore required to look behind the notices to determine the intent. This examination, rather than analyzing the four corners of the notices, is contrary to the existing law as postulated to date by the Tax Court.

Respondent issued the "post-filing" notification letters on November 2, 1984, a date subsequent to the time Appellants' 1983 tax returns were required to have been filed. (26 U.S.C. Sections 6072 and 6081.) It is therefore clear that Appellee's Internal Revenue Service had, by such notices, determined that additional tax was due and owing from the Appellants based upon their 1983 investment with Liberty Financial. A simple numerical calculation is all that remains to be done to determine the amount of the additional tax for each taxpayer.

That the Appellee's Internal Revenue Service had, at the time of mailing said notices, determined tax deficiencies is further evidenced by the fact that the Internal Revenue Service has withheld a 1984 tax refund of one of the taxpayers-petitioners. The Service made the

determination that said refund was being withheld solely based on the prior issuance of the post-filing notification letter dated November 2, 1984, relative to the Liberty Financial deduction. The notice of withholding of refund, dated August 8, 1985 is Exhibit A to Renewal of Petitioners' Motion for Reconsideration of Findings of Facts or Opinion.

THE IRS LETTERS, DATED NOVEMBER 2, 1984, ARE "POST-FILING" RATHER THAN "PRE-FILING" NOTIFICATION LETTERS

The Tax Court's Opinion in this case, dated June 17, 1985, contains a very glaring error. It repeatedly refers to the November 2, 1984 letters to Appellants as "pre-filing" notification letters; in fact, such letters are "post-filing" notification letters. The distinction is dramatic inasmuch as the deduction, relative to Appellants' 1983 investment with Liberty Financial, had

already been claimed on their tax returns when said notices were mailed. The latest possible valid extension of time to file the 1983 Form 1040 would have expired on October 15, 1985. (26 U.S.C. Sections 6072 and 6081). The notification letters were based on actual deductions claimed and not the potentiality or probability that such deductions would be claimed on returns to be filed for the taxable year at issue. Consequently, the amounts of the deductions were certain, and the amounts additional tax due pursuant to a disallowance of said deductions are easy to calculate.

IRS REVENUE PROCEDURE 83-78, 1983-2 C.B. 595 (MODIFIED BY REV. PROC. 84-84, 1984-2 C.B. 782)

Revenue Procedure, 83-78, 1983-2 C.B. 595, sets forth the procedure by which the Internal Revenue Service may issue pre and post-filing notification letters.

Furthermore, Revenue Procedure 84-84, 1984-2 C.B. 782, at Section 1.01 describes:

> . . . the Abusive Tax Shelter Detection Program implemented by the Internal Revenue Service at Internal Revenue Service Centers. Under this program the Service will detect and identify those returns that claimed benefits from abusive tax shelter promotions before processing and before refunds are paid (front-end identification), will reduce refunds of investors when appropriate, and will offset deficiencies assessed under the provisions of section 6212(b)(3) of the Internal Revenue Code against scheduled refunds resulting from tentative carryback adjustments under section 6411(b). Returns subject to review under this program include those in which pre-filing notification letters have been issued to the investors and returns that are selected based upon

> certain criteria with emphasis on identifying particularly abusive tax shelter promotions. For purposes of this revenue procedure, an income tax return showing a refund due is considered a claim for refund.
>
> * * *

Counsel for Appellee explains the background and reason for Revenue Procedure 83-78, supra (modified by Rev. Proc. 84-84, supra) as follows:

> * * *
>
> Subsequently, the Service issued Revenue Procedure 83-78, in which it outlined three steps that it would be taking with regard to abuse of tax shelters, namely, the assertion of monetary penalties under section 6700, injunction procedures under section 7408, and the issuance of prefiling notification letters to investors in shelters which the Service had determined were abusive. (Emphasis supplied.)

* * *

(R.T., page 3, lines 14-24.)

Government counsel proceeded to state that the notification letters are merely "advisory" inasmuch as it only alerts the taxpayers that the Service will audit their returns based upon their deduction with respect to the "abusive shelter." Counsel articulates three situations which she perceives as consequences of a judicial determination that the notification letters constitute notices of deficiency. It is noteworthy that not one of the initial alternative consequences contemplated by the Internal Revenue Service, even after further examination of the taxpayers' returns, results in ultimately allowing the

deduction.1

The three consequences are discussed below.

First, it is argued that the Internal Revenue Service will assume the burden of proof in Tax Court if other issues are subsequently raised upon further scrutiny of the return. This is correct. However, it is not unfair to have the Government assume the

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1 However, the Court should compare Government Counsel's additional, and apparently inconsistent remarks, as follows (R.T., page 24, lines 1-6):

> MS. WHATLEY: Your Honor, it is quite possible that upon examining the returns in question, the Service could conclude that it was a no change situation. It is quite possible that, upon an examination, the Service could determine that there are other items on the return that would entitle the taxpayer to a refund.

burden of proof if, as between the taxpayers and the Internal Revenue Service, the latter implemented a procedure which allowed taxpayers an opportunity for judicial review of the Government's action, and the Government during that judicial proceeding added new issues. The Tax Court's Rules of Practice and Procedure, Rule 142(a) provides for this situation as follows:

* * *

> (a) General: The burden of proof shall be upon the petitioner, except as otherwise provided by statute or determined by the Court; and except that, in respect of any new matter, increases in deficiency, and affirmative defenses, pleaded in their answer, it shall be upon the respondent. As to affirmative defenses, see Rule 39.

* * *

Second, Government Counsel argues that if the Court determines the notification letters to be notices of deficiency, then others who received such notices without petitioning the Tax Court will be subjected to collection actions. This is not correct. The Internal Revenue Service can issue additional notices of deficiency, which are not duplicative, for a particular tax year up to the time the statute of limitations expires for that year. (26 U.S.C. Sections

6501 and 6212(c)(1). [2] Cf. Barth Foundation 77 T.C. 1008, 1012-13 (1981). In the circumstance at bar, the 1983 income tax year statute of limitations for assessment would, for individuals, not expire at the earliest until April 15, 1987 (26 U.S.C. Sections 6072(a), 6501(a) and (b)(1) and for corporations not until March 15, 1987 (26 U.S.C. Sections 6072(b), 6501(a) and (b)(1).

Third, a determination that notices of deficiency were in facts issued does not

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[2] Note Section 6212(c)(1) prohibits additional notices of deficiency for a given income tax year, if a notice has been sent and the taxpayer files a timely petition in the Tax Court. The PFN creates a "catch 22" situation if the IRS succeeds in its position. Under the IRS approach a PFN is not a notice of deficiency, but it is IRS will attempt collection as to taxpayers who did not timely petition the Tax Court. The IRS, apparently, is not considering the more fair procedure of issuing a timely traditional notice of deficiency prior to the expiration of the statute of limitations for assessment.

conflict with the holding in Estate of Adamczyk, T. C. Memo 1981-259, 41 T.C.M. 1596 (1981). The letters herein are not akin to "30 day letters," which Appellants agree do not constitute notices of deficiency. There is a significant due process distinction between the so called "30 day letters' and the PFN herein. The reason the PFN is different from a "30 day letter" is that a "30 day letters" gives a taxpayer an opportunity administratively to protest the IRS adjustments, after having proceeded through a revenue agent's examination, presenting evidence and argument as to items scrutinized by the revenue agent during the examination. Further, the "30 day letter" is a product of the net proposed adjustment after the give and take of a revenue agent examination of the mertis. By way of contrast, the PFN is a gross determination,

without the taxpayers first having an opportunity to present evidence to the IRS at the individual level. Instead, the PFN, as in fact utilized by the IRS herein, has determined on its own that the particular tax benefit is disallowed. Thereafter, the determination made is used as a basis, in a substantive manner, to impose penalties or withhold refunds, without first permitting the taxpayers administrative or judicial review. This procedure smacks of unfairness, as it is simply without due process, repugnant to the guarantees provided by 26 U.S.C. Section 6213(a), which states inter alia:

* * *

> . . . Except as otherwise provided in section 6851 or section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A, or B, chapter 41, 42, 43, 44, or 45 and

> no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayers, not until the expiration of such 90-day or 150 day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.
>
> * * *

It is noteworthy at least one refund has been withheld pursuant to the PFN without the taxpayers first having an opportunity to be heard, solely on the basis that a PFN had

been issued. [3] The conduct of the Internal Revenue Service in issuing the PFNs at bar demonstrates clearly that the notices are utilized by the Service, unlike the classical, i.e., "90 day letters," to deprive taxpayers of concurrent administrative review as well as the actual taking of property, to wit: refusal to pay refunds based solely on the issuance of PFNs. It is submitted that this IRS course of conduct is unfair and denies taxpayers due process of the law.

The Internal Revenue Service by the procedures, articulated in Rev. Proc. 83-78, supra, and Rev. Proc. 84-84, supra, is attempting to vitiate Appellants' legal and

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[3] The essence of this action clearly demonstrates that the PFN is in fact being used in a substantive manner as a "notice of deficiency," outside the established statutory procedure of 26 U.S.C. Section 6212 and 6213, enacted by Congress to protect taxpayer rights.

administrative rights, without affording due process to permit judicial review of its action by the Tax Court. The essence of the Government's position is that for judicial review purposes the PFNs are not notices of deficiency or "tickets of admission" to the Tax Court, but for collection of the additional revenue it alone believes due, the IRS considers PFNs as "notices of deficiency."

APPELLEE IS ARGUING FORM vs. SUBSTANCE WITH RESPECT TO WHETHER THE NOTIFICATION LETTERS CONSTITUTE NOTICES OF DEFICIENCY

The Supreme Court has, in many cases, utilized the "form vs. substance" doctrine in determining whether a particular situation or transaction is proper and valid under the tax laws. Gregory v. Helvering, 293 U.S. 465 (1935); Commissioner of Internal Revenue v. Court Holding Company, 324 U.S. 331 (1945); United States v. Cumberland Public Service

Company, 338 U.S. 451 (1950). Basically, this doctrine looks behind the form of the transaction to determine whether its actual substance, and not the apparent form, is in accordance with the tax laws. By analogy, this doctrine can be applied to the situation at bar. The "form" of the PFN letters is not the form that a notice of deficiency usually takes, but the substantive impact is the same. Counsel for the Internal Revenue Service argues (R.T., pages 4-5) that said notification does not contain the requisite elements to be "notice of deficiency." However, the notification letters set forth the following:

1. Taxpayer,
2. Year; and
3. Adjustment.

All that remains is a simple mathematical calculation to determine the dollar amount of

the deficiency. The notification letters clearly states, inter alia:

> We plan to review your return to determine whether you claimed such deductions and/or credits. If you did so, we will examine your return and reduce the portion of any refund due to you which is attributable to the tax shelter promotion. (Emphasis supplied.)

In substance, the notices which contains the above statement, effectively disallows Appellants' deduction relative to the Liberty Financial investment. The amounts can be clearly determined upon a brief analysis of the individuals' tax return, who have received the PFN, after such PFN letters are not in the classical form a notice of deficiency traditionally takes, it, in substance, does qualify as a notice of deficiency, since it contains the judicially recognized elements necessary for such a

notice of deficiency as contemplated by 26 U.S.C. Sections 6212 and 6213:

> Neither section 6212(a), which authorizes the sending of the notice of defi :iency, nor any other section of the Internal Revenue Code prescribes the form of a notice of specifies the contents or information required to be included therein. Jarvis v. Commissioner, 78 T.C. 646, 655-656 (1982). The Treasury regulations are also silent. See, e.g., Sec. 301.6212-1, Proced. & Admin. Regs. All that we have required is that the notice fulfill its purpose of providing formal notification that a deficiency in tax has been determined. Pietz v. Commissioner, 59 T.C. 207, 213-214 (1972); Mayerson v. Commissioner, 47 T.C. 340, 349 (1966); Standard Oil Co. v. Commissioner, 43 B.T.A. 973, 998 (1941), affd. 129 F.2d 363 (7th Cir. 1941). Accord Olsen v. Helvering, 88 F.2d 650, 651 (2d Cir. 1937).

* * *

In Jarvis v. Commissioner, 78 T.C. 646, 655-656 (1982) which is cited in the Government's Motion to Dismiss, the Tax Court was called upon to determine the sufficiency of the "notices of deficiency." The Court analyzed the facts and articulated its position as follows:

* * *

> The principal contention raised in the petition is that the notice of deficiency is "defective and unenforceable cause the Respondent does not cite which statutory law the Petitioner violated." The Internal Revenue Code of 1954 in neither section 6212(a) nor elsewhere prescribes the form of a notice or the specifics to be contained therein. Mayerson v. Commissioner, 47 T.C. 340, 348 (1966); Estate of Eversole v. Commissioner, 39 T.C. 1113, 1119-1120 (1963); Barnes v. Commissioner,

408 F.2d 65, 68 (7th Cir. 1969), affg. Barnes Theatre Ticket Service, Inc. v. Commissioner, a Memorandum Opinion of this Court. The notice of deficiency herein involved was sufficient to fairly advise petitioner that deficiencies in income taxes and additions to the tax had been determined and the years and amounts thereof. See Olsen v. Helvering, 88 F.2d 650, 651 (2d Cir. 1937), where the court cogently stated, "the notice is only to advise the person who is to pay the deficiency that the Commissioner means to assess him; anything that does this unequivocally is good enough." Thus, the Commissioner was not required to cite the statutory law which petitioner had violated. The notice is not invalid and does not deprive petitioner of due process of law and equal protection of the law 16 or violate the Fifth Amendment.17 (Footnotes omitted) (Emphasis supplied)

* * *

Here the notification letters do in fact advise the taxpayers that the Internal Revenue Service means to assess a tax, inasmuch as it states that any refund due pursuant to a deduction claimed with respect to the Liberty Financial investment will be reduced by such amount. The Internal Revenue Service has also unequivocally demonstrated its actual position, and true intent, by withholding the 1984 refund of one of the taxpayers-co-petitioners, based solely on receipt of the PFN letter, without first granting such taxpayer the opportunity to have the IRS assertion administratively or judicially reviewed. Thus, the Government's position at bar contemplates no administrative or judicial review, but is summary unilateral action. This new procedure denies due process.

Similarly, in Foster v. Commissioner, supra at 229-230, the petitioners argued that the notice of deficiency was invalid because it failed to specify the corporate and partnership expenses which were being disallowed. The Tax Court stated that all the notices is required to do is: "(1) fairly advise the taxpayers that the Commissioner has, in fact, determined a deficiency and (2) specify the year and amount." Taxpayers further submits that the notification herein meet these requirements, for all that remains to determine the precise dollar amount of the deficiency is a simple mathematical calculation.

In addition, taxpayers submit that in "substance," the notification letters contain the same required information and has the same effect as "traditional" notices of deficiency, for it is clear that no

particular form is required for a notices of deficiency. Consequently, as a matter of substance in the context of protecting taxpayers' due process rights as provided by 26 U.S.C. Section 6213(a), the "post-filing notification" letters at bar contain all the necessary elements of notices of deficiency granting taxpayers the right to have the IRS assertions presently judicially reviewed. Further indication that such notices are equivalent to notices of deficiency is the Commissioner's act of withholding taxpayers' subsequent year's tax refund based solely on such notices. Consequently, the doctrine of substance versus form, when applied in the due process context, dictates that this Court determine that notwithstanding the new form, the notification letter at bar is in substance notices of deficiency as contemplated by 26 U.S.C. Sections 6212 and

6213. Given this view, taxpayers would be assured of their due process rights, since the Tax Court would have jurisdiction of their 1983 income tax deficiency case. (26 U.S.C. Section 6213(a).)

NEW PENALTY PROVISIONS ASSERTED IN NOTICES OF DEFICIENCY DO NOT ASSERT EXACT AMOUNTS

The Internal Revenue Service would like to have it both ways. On the one hand, the Service contends that the notification letters do not qualify as notices of deficiency as they do not assert a deficiency or specify the amount of tax due. On the other hand, the IRS is also presently asserting penalties, for example, in deficiency notices pursuant to Sections 6621(d) and 6653(a)(2) (26 U.S.C.) without specifying the amount(s) of the penalties and simply stating that the penalties asserted are in "amounts to be determined." As to these notices, the IRS has not been

contending any legal infirmity as a notice of deficiency for each of taxpayers-appellants based on the disallowance of their 1983 deduction relative to their Liberty Financial investment as it is for the IRS to calculate the amounts of the penalties, such as the one determined in Sections 6621(d) and 6653(a)(2), by way of example.

Obviously, such amounts cannot be calculated until it is determined (1) that such penalties are applicable, (2) the amount of each adjustment, and (3) the total amount of tax due. These simple mathematical calculations are made either when the case is settled with the Appeals Office of Appellees' Internal Revenue Service or by judicial decision. Thus, if the Government's theory as to why the PFN at bar are not notices of deficiency are applied to notices of deficiency actually being issued in the

classical form with such penalties being part of the notices, those notices would also not be notices of deficiency as contemplated by 26 U.S.C. Sections 6212 and 6213. The Government is making no such argument in the non PFN notice situations.

APPELLANTS ARE ENTITLED TO DUE PROCESS OF THE LAWS AND JUDICIAL DETERMINATION OF THE NOTIFICATIONS RECEIVED WITH RESPECT TO THEIR 1983 TAXABLE YEARS

By issuing the post-filing notification letters, but denying that such notices constitute notices of deficiency within the contemplation of Section 6213(a), from which a taxpayer may seek immediate judicial review in the Tax Court, such procedure denies taxpayers due process. This procedure, if allowed to stand, is therefore violative of the guarantees provided by the United States Constitution in Amendments 5 and 14.

Appellee in essence argues that the notification letters were intended as other

than notices of deficiency. This is contrary to the evidence. One of the taxpayers-petitioners received a notice from the IRS advising him that their 1984 refund was being withheld because he "should have received a pre-filing notification letter regarding the Liberty Financial Services." His refund is not being frozen or placed in suspense, it actually has been taken (denied) pursuant to Rev. Proc. 84-84, supra, solely on the basis of issuance of a PFN.

The Government is attempting to create a no-win situation for taxpayers. If the letter is a "pre-filing" notification, taxpayers would more than likely be chilled from claiming the subject deduction. In fact, counsel for the Internal Revenue Service indicated at the oral hearing that the Internal Revenue manual states that one of the purposes of the letter is to

"encourage investors to file a correct return" (R.T., page 3, lines 21-24). [4] The consequence is that if no deduction is claimed, then no administrative or judicial redress is afforded the taxpayers, since the IRS will deem such a return is correct and no examination is necessary. Consequently, the IRS has achieved by this procedure what it could not otherwise achieve if it had used traditional procedures, as contemplated by 26 U.S.C. Section 6213(a). In the traditional situation, the IRS would have first examined the return, permitting the taxpayers administrative review and then issued a classical form notice of deficiency permitting the taxpayers to petition the Tax Court. The Government argues that "post-

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[4] Apparently, a "correct return" as determined by the Internal Revenue Service is one where no deduction for the Liberty Financial Investment is claimed.

filing notification" does not permit taxpayers immediate right of judicial review. Rather, in the Internal Revenue Service's version of due process, taxpayers can challenge its actions sometime in the future, when it resumes adhering to the usual procedures. In the meantime, under the new procedures provided by Rev. Proc. 83-78, supra, and Rev. Proc. 84-84, supra, taxpayers' due process is suspended and not operative since the PFN is not considered as a notice of deficiency because the IRS did not intend that result. The actual net result, however, is a subjugation of taxpayers' rights and a disregard of fair play and due process.

THE GOVERNMENT MAY BE SUBJECT TO DAMAGES AS IN THE CASE OF MID-SOUTH MUSIC CORPORATION V. UNITED STATES OF AMERICA

This case is particularly important in light of the case of Mid-South Music

Corporation v. United States of America, ___F. Supp.___, 56 AFTR 2d 85-6250 (USDC, M.D. Tenn. 1985) on remand from C.A. 6, 756 F.2d 23 (1984). In said case, Mid-South was awarded general damages of $174,000.00 and punitive damages of $1,000.00 from the United States of America. In Mid-South, as in the case at bar, the Government issued pre-filing notification letters prior to a determination, as a matter of law, that Mid-South was an abusive shelter.

The District Court, upon remand from the Sixth Circuit, awarded the plaintiff compensatory damages in the amount of $174,000.00 and punitive damages in the amount of $1,000.00 for disclosure of plaintiff's tax return information in pre-filing notification letters (PFNS) issued to customers of the plaintiff-taxpayers, pursuant to the authority of 26 U.S.C. Section 7431.

The history of the case is as follows.

Initially, Mid-South brought suit in District Court against the United States and various officials of the Internal Revenue Service, claiming (1) deprivation of due process of law pursuant to the Fifth Amendment of the Constitution, and (2) that the IRS violated the non-disclosure provisions of Internal Revenue Code Section 6103(a). As in the case at bar, the IRS had issued PFN's to Mid-South's clients prior to: (1) determining that Mid-South was an "abusive" tax shelter, (2) determining promoter penalties pursuant to Section 6700, or (3) initiating injunction proceedings against Mid-South pursuant to Section 7408.

In its initial opinion, found at 579 F. Supp. 481 (1983), the District Court held that Mid-South had no valid constitutional claim against the IRS agents for their

failure to follow mandatory procedures as set forth in the Internal Revenue Code. [5] The Court was of the view that nothing precluded the Service from issuing the PFNs rather than utilizing the injunction procedure. The Court further held that plaintiff was foreclosed from suing the individual agents of the United States' Internal Revenue Service, as the only proper entity to sue was the United States. Finally, the Court held, as a matter of law, that the PFNs did not disclose return information of the plaintiff, or otherwise indicate whether plaintiff's return was the subject of examination or

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[5] However, footnote 4 of its opinion states:

> "The Court expresses no opinion as to whether any failure of the IRS to have followed any prescribed statutory procedures would have amounted to a deprivation of the of the plaintiff's right to due process of law under the Fifth Amendment of the Constitution."

investigation.

Taxpayer appealed this decision to the Court of Appeals for the Sixth Circuit. See Mid-South Music Corporation v. Kolak, et al., 756 F.2d 23 (6th Cir., 1984). That Appellate Court upheld the District Court decision insofar as it held that Mid-South had no Fifth Amendment property interest and that the United States was the proper party-defendant. However, it remanded to the District Court the issue of whether issuance of the PFNs violated the non-disclosure provisions of Internal Revenue Code Section 6103(a). The Appellate Court held that Mid-South's allegations that the PFNs revealed its identity as a taxpayer and that it was under IRS investigation, stated a colorable claim.

Thereafter, the Government, initiated an action for an injunction against Mid-South

and its president, pursuant to Section 7408 and sought promoter penalties pursuant to Section 6700. See United States v. Mid-South Music Corporation, et al., _____F. Supp._____, 56 AFTR 2d 85-6002 (USDC M.D. Tenn. 1985) The District Court determined that Mid-South and its president had made gross valuation overstatements of its master sound recordings and enjoined Mid-South and its president from further engaging in conduct subject to penalties pursuant to Sections 6700 and 7408. The impact of this determination is that it was not until 1985, some two years after the PFNS had been issued, not it was determined as a matter of law that Mid-South Music Corporation promoted an "abusive tax shelter," as contemplated by 26 U.S.C. Sections 6700 and 7408.

In the fourth proceeding of the case concerning Mid-South, found at ____F.

Supp.____, 56 AFTR 2d 85-6250 (USDC, M.D. Tenn., 1985), upon remand from the Sixth Circuit, the District Court held that the Government had in fact violated the non-disclosure provisions of Section 6103(a) vis a vis issuance of the PFNs prior to a judicial determination that Mid-South was a so-called "abusive tax shelter." The District Court stated in its Findings of Fact, paragraph 13, inter alia:

> "...personnel of the Internal Revenue Service acted in bad faith in sending such letter for the intended purpose of destroying the tax shelter promotion of Mid-South before its abusiveness was established as a matter of law."

The language and effect of the PFNs issued to the clients of Mid-South and those issued to Appellants herein are nearly identical. Further, the PFNs here were issued in the same manner, i.e., before a

determination had been made as a matter of law as to whether Liberty Financial violated Section 6700, or any other provision of the Internal Revenue Laws, in any manner.

Indeed, the harshness of the Government's course of conduct against the Appellant-Taxpayer is revealed by the fact that to date there has been no formal determination as a matter of law that Liberty Financial is an "abusive tax shelter" within the contemplation of 26 U.S.C. Sections 6700 and 7408. Notwithstanding this lack of determination, as a matter of law, that Liberty Financial is an "abusive tax shelter," the IRS unilaterally initiated the issuance of the PFNs at bar purporting to disallow deductions, tax refunds and other benefits, without the benefit of judicial review.

CONCLUSION

For the foregoing reasons, this petition should be granted and a writ of certiorari should be issued to review the decisions below.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that three (3) copies of: PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT were served by mail, on the 8th day of July, 1986, in an envelope with postage prepaid, to Counsel for Respondent-Appellee, as follows:

Michael L. Paup, Esq.
Richard Farber, Esq.
Gary D. Gray, Esq.
Tax Division
U. S. Dept. of Justice
Washington, D.C. 20530

Cathey E. Taylor

CATHEY E. TAYLOR

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Richard L. Abrams, Wesley A. Aikens, Fred W. Aldrich, John J. Alford, Park O. Ames, Joseph C. Anderson, Teho V. Anderson, V. R. Barnhouse, Jr., James L. Baumdel, Alfredo J. Bayardo, William L. Becker, Jeremiah Benzvi, Don Bilsborough, Leo D. Borin, Andres Borruel, Robert G. Brown, Paul C. Campbell, Fred J. Canizales, Jay F. Cano, Kent Carper, Kishore Chokshi, Gordon W. Clancy, Julian R. Coles, Norman C. Cross, Jr., James W. Deggendorf, John C. Dolson, Steven E. Donley, J. G. Edsall, Robert E. Elms, Jr., Anthony C. Ernest, George P. Foster, Clinton R. Fuhrmann, Wayne L. Garden, R. A. Gaska, John A. Gauthier, Steven P. and Tracey Gesiriech, Eric J. Gobler, John F. Gray, Julius Griffin, Thomas Hardin, Paul E. Harris, R. W. E. Harrison, Jr., Henry K. Hasserjian, Joseph S. Howard, Isaac-Foster Insurance Agency, Randal L. Jackson, Jeff A. Johnson, Jay Jurkowitz, Robert A. Kemmerer, Susan B. Kennedy, Clement Lambert, Peter B. Lambert, Terry L. Lesley, Rodrick K. Leung, Carl E. Lindstrom, Charles H. Logan, Nicholas D. Mamalis, Richard L. Marks, Richard T. mcAller, Arthur McDonough, Robert L. McLeroy, Mikhan, Inc., Carroll G. Miller, Stephen K. Mills, Henry H. Modrak, Richard J. Moore, Dona A. Nafziger, R. Wayne Neal, Richard L. Neal, Dennis L. Nichols, Kenneth W. Nyborg, Lewis L. Patrick,

Ken Peet, Darol O. Petersen, Fred L. Picklesimer, Jon H. Purberry, Richard D. Raines, William W. Ramsey, Dean D. Reavie, William W. Reid, Michael J. Renfro, Rickie R. Richey, David G. Ritchie, James Ritchie, R. Clio Robertson, Russell D. Robinson, John P. Shirley, H. R. Slack, Kirk M. Smith, Thomas L. Smith, James Sobba, Robert E. Spann, W. M. Spector, W. L. Storey, James M. Stokes, Stringham Lumber Co., Denise C. Suek, Paul D. Swanson, Everett F. Telljohann, James P. Thies, Allan W. Thompson, William F. Trackler, James Melvin Treese, Ivan Van Dyke, Stephen F. Welsh, John J. Wendling, Ray Wicker, and Lawrence M. Zolot,

Plaintiffs,

and

Telford, S. Eggleston, Jr., James B. Embree, and Dwaine E. Getz,

Appellants,

versus

Commissioner of Internal Revenue,

Appellee.

Appeal from the United States Tax Court.

Judge Dawson, Tax Court Judge. (Tax Ct. No. 2645-85).

Argued: February 5, 1986

Decided: April 9, 1986

Before WIDENER, MURNAGHAN, and WILKINSON, Circuit Judges.

Martin A. Schainbaum (Kathleen A. Miller; James E. Ritchie on brief) for Appellants; Gary D. Gray, Department of Justice (Glenn L. Archer, Jr., Assistant Attorney General; Michael L. Paup; Richard Farber on brief for Appellee.

MURNAGHAN, Circuit Judge:

Converting a sow's ear into a silk purse is acknowledgly difficult. Seeking to convert into a notice of deficiency an Internal Revenue Service letter warning the petitioners that an attempt to utilize, for

income tax purposes, a specific "tax shelter" would result in a redetermination leading to an assessment of a deficiency or a reduction or elimination of a refund amounts to an effort of equal audacity and equal futility.

I.

A large number of taxpayers invested in a so-called tax shelter known as the "Liberty Financial 1983 Government Securities Trading." They took the "tax shelter" into account in preparing and filing 1983 federal income tax returns. The Internal Revenue Service, in letters dated November 2, 1984, informed the taxpayers that it believed that deductions derived from investments in Liberty Financial were not allowable, and additionally remarked that taxpayers making use of the tax shelter who might already have filed their returns might wish to file amended returns. The Internal Revenue

Service letter came after filing in most if not all cases had taken place.

The letter read:

Re: Liberty Financial 1983 Government Securities Trading Strategy.

Dear Taxpayer:

Our information indicates that you invested in the above tax shelter during the above tax year. Based upon our review of that promotion, we believe the purported tax deductions and/or credits are not allowable.

We plan to review your return to determine whether you claimed such deductions and/or credits. If you did so, we will examine your return and reduce the portion of any refund due to you which is attributable to the above tax shelter promotion. If an examination results in adjustments to your return, you will be afforded the opportunity to exercise your appeal rights. The Internal

Revenue Code provides, in appropriate cases, for the application of the negligence penalty under section 6653(a), the overvaluation penalty under section 6659 and/or the substantial understatement of income tax penalty under section 6661 of the Internal Revenue Code and other appropriate penalties. Our examination will determine whether these penalties are appropriate. See the back of this letter for an explanation of these penalties.

If you claimed deductions and/or credits on a return already filed, you may wish to file an amended tax return...

On January 25, 1985, the appellants herein joined with 108 other taxpayers in filing a consolidated petition in the United States Tax Court for redetermination of the purported deficiencies allegedly asserted in the letters received from the IRS. The

Commissioner moved to dismiss the petition for lack of jurisidiction on the ground that the letters were not notices of deficiency, and that the issuance of a notice of deficiency is a precondition to Tax Court jurisdiction. The Tax Court granted the Commissioner's motion and dismissed the petition. Taxpayers Eggleston, Embree, and Getz appeal from that dismissal.

II.

The United States Tax Court is a court of limited jurisdiction. 26 U.S.C. §7442. A notice of deficiency is a prerequisite of tax court jurisdiction. Rule 13, Rules of Practice and Procedure of the United States Tax Court, 26 U.S.C. §7453; Commissioner v. Gooch, 320 U.S. 418, 420 (1943); Magness v. Commissioner, 334 F.2d 759 (4th Cir. 1964); DaBoul v. Commissioner, 429 F.2d 38 (9th cir. 1970).

To qualify as a notice of deficiency, while a document need not assume any particular form, Commissioner v. Forest Glen Creamery Co., 98 F.2d 968, 971 (7th Cir. 1938), cert. denied, 306 U.S.C. 639 (1939); Olsen v. Helvering, 88 F.2d 650, 651 (3d Cir. 1937), nevertheless, it must meet certain substantial requirements. There must be a statement that the Internal Revenue Service has examined a return and determined a deficiency. It must inform the taxpayer of the exact amount of the deficiency. Commissioner v. Stewart, 186 F.2d 239, 242 (6th Cir. 1951); Florest Glen Creamery Co., supa, at 971; Olsen, supra, at 651. As the letter of November 2, 1984 made pellucidly clear, examination of the returns of each individual taxpayer had not as yet been made. The most important observation to be made about the letter is that it left no doubt

that, as yet, there had been no general review of any return, no computation of any deficiency not any reduction in refunds to which the taxpayers might otherwise be entitled. It was in essence only fair warning of what the taxpayers sheltering income through the Liberty Financial 1983 Government Securities Trading Strategy might expect. The Internal Revenue Service explicitly deferred any decision as to whether there would be an adjustment in the tax liability reported on each return, in which case the rights of appeal legally provided to the taxpayers would then be available.

The plaintiffs, having taken questionable deductions, now seek to follow a questionable procedure to get priority treatment of a claim which has not yet matured. Their attempt to say that only a

mathematical computation which could readily be made by the Internal Revenue Service or its computers stands in the way of establishing the disallowed deduction and, therefore, the amount of the deficiency or refund reductions is a gross oversimplication. Examination of a return might well disclose additional and independent reasons for adjusting the tax shown on the return as reported. Such an additional and independent adjustment could be in favor of a taxpayer who inadvertently had overpaid his taxes or to the disadvantage of a taxpayer who, for reasons independent of the "tax shelter," had not rendered unto Caesar all that was Caesar's.

Indeed, all that happened was that the Internal Revenue Service, with a direct interest in the matter, gave the petitioners unsolicited advice not to claim "Liberty

Financial 1983 Government Securities Trading Strategy" as a deduction or credit, advice they were free to accept or reject. It may have been good advice, or, if a taxpayer concluded that it was not, could be ignored. The justifiable interest in the matter on the part of the Internal Revenue Service stemmed from the fact that some practices not truly of abusiveness nature and euphemistically designated "tax shelters" constitute, in fact, unwarranted raids on the treasury. Participation in an abusive tax shelter is subject to a penalty, 26 U.S.C. §6700, and may be enjoined in a suit brought by the United States, 26 U.S.C. §7408. The Commissioner of Internal Revenue may properly take steps to discourage such abusive activity.

If the three taxpayers, appellants here, were right in their contention that the

November 2, 1984 letter constituted a deficiency notice for all the many taxpayers involved, those taxpayers not involved in the present petition would later in all probability be foreclosed from contesting in the Tax Court any true deficiency assessed by the Internal Revenue Service. Under 26 U.S.C. §6213(a) a taxpayer must file a petition with the tax Court for a redetermination of the deficiency within 90 days after the notice of deficiency is mailed. If the taxpayer does not file a petition with the Tax Court within that period, the deficiency must be paid upon notice and demand from the Internal Revenue Service. 26 U.S.C. §6213(c). Here, more than 90 days have passed from the mailing of the post-filing notification letters. If those letters were treated as notices of deficiency, the statutory period for filing a

petition with the Tax Court would have expired. Those investors in Liberty Financial who have not joined in the present petition would then have lost their chance to seek review in the Tax Court.

Appellants' inexplicit and cursory arguments that due process will be denied by a decision that the November 2, 1984 letter was not a deficiency notice are extremely unpersuasive. Having filed tax returns, the petitioners have no right to jump to the queue to obtain the equivalent of a declaratory judgment proceeding so that any possible income tax liability may be established at a preferentially early date. The Internal Revenue Service has until limitations run to act and, until it does, by sending a notice of deficiency, the taxpayer must abide by the discomfort common for us all that any uncertainty entails before a

proceeding in the Tax Court can commence. If the taxpayer wants to get things going earlier, the only available procedure would be to pay an amount he deems excessive, without claiming the questionable deduction, and then sue in the United States District Court for a refund. See McConkey v. Commissioner, 199 F.2d 892, 895 (4th Cir. 1952), cert. denied, 345 U.S. 924 (1953)

Consequently, the United States Tax Court was entirely correct in dismissing the petition for want of jurisdiction and should be affirmed.

AFFIRMED